ment of the license to an otherwise qualified recipient. *See generally* Jefferson Radio Co., Inc. v. FCC, 119 U.S.App.D.C. 256, 340 F.2d 781 (D.C. Cir. 1964); United Television Co. of New Hampshire, 38 F.C.C.2d 400 (1972); Gross Broadcasting Co., 31 F.C.C.2d 226 (1971). However, in recognition of the public interest in protecting innocent creditors, the Commission will approve the sale and assignment of the bankrupt's license when the transaction will not unduly interfere with the FCC mandate to insure that broadcast licenses are used and transferred consistently with the Communications Act. As the Commission recently explained its *Second Thursday* doctrine:

> [D]espite the general rule that an assignment of license will not be authorized during the pendency of a hearing involving the character qualifications of a licensee, the Commission will permit such upon a showing that alleged wrongdoers will derive no benefit, either directly or indirectly, from the sale or will derive only minor benefit which is outweighed by the equities in favor of innocent creditors.

Shell Broadcasting, Inc., 38 F.C.C.2d 929, 931 (1973). *See also* Image Radio Inc., 15 F.C.C.2d 317, 319 (1968).

The Commission's regular practice is to approve an involuntary assignment of the license to a receiver in bankruptcy, who must then find a qualified purchaser and structure the sale in compliance with the mandate of *Second Thursday*. Thus, in evaluating the petition for assignment of the license from the receiver to the proposed assignee, the Commission must assess both the assignee's qualifications and the public interest considerations embodied in *Second Thursday*, which relate to the minimization of profit by the bankrupt parent-licensee.[4]

III

Appellant LaRose initially arranged for a transfer that, according to his judgment, would have satisfied the requirements of the Commission's stated policy. While he obtained the referee's approval of the sale, LaRose failed in this regard with the Commission. LaRose then arranged another sale on different terms to another buyer (appellant Swaggart) which the Commission refused to consider.

The Commission's reason for this latter action was stated to be the public interest in the finality of administrative decisions. Quoting from this court's decision in Fischer v. Federal Communications Commission, 135 U.S.App.D.C. 134, 417 F.2d 551, 555 (1969), in which we held that administrative agencies need not "play games with applicants" who change plans only after failing to succeed in advancing more favorable proposals, the Commission observed that "the Receiver would have us commence the entire process anew for the purpose of considering a different proposal . . . . [A]t some point the administrative proceeding must be brought to a conclusion and we believe that point has been reached here." 38 F.C.C.2d 1101 (1972).

Administrative finality so employed does not go to the Commission's jurisdiction to entertain the petition for reconsideration of the non-renewal of the WLUX license. The Commission retained authority to reconsider its earlier decision on that score until an appeal was filed in this court, or until the time for filing such an appeal had expired. *See* Greater Boston Television Corp. v. FCC, 149 U.S.App.D.C. 322, 463 F.2d 268, 282–283 (1971); W. S. Butterfield Theatres v. FCC, 99 U.S.App.D.C. 71, 237 F.2d 552, 555 (1956). Thus, the considerations of public interest inher-

4. The qualifications of the original licensee are irrelevant to this determination, as are those of the receiver in bankruptcy who is at the time licensee by virtue of the involuntary assignment. In some cases an additional issue will be interjected by the filing of an independent petition to operate on that frequency. In such a case, the Commission would conduct a comparative hearing between the proposed assignee and the other petitioner. *See* Arthur A. Cirilli, 2 F.C.C.2d 692, 693 (1966).

ent in the *jurisdictional* concept of administrative finality are not significantly implicated. Rather, the public interest considerations to be preserved in refusing to reconsider renewal of the WLUX license and its simultaneous sale and assignment to appellant Swaggart are those protected by any denial of any attempted second bite at the administrative apple. Paramount among those interests is the promotion of administrative efficiency. Additionally, the Commission's refusal to reconsider can in some cases serve to prevent the possible duplicity of parties who attempt to urge one goal, and, after having failed at that, thereafter advance a less desirable but more plausible position. *See Fischer, supra.*

However, as the Commission has recognized, *Fischer* does not announce an iron-clad rule of administrative finality. Indeed, after having prevailed before this court in *Fischer*, the FCC thereafter waived its prohibition against consideration of repeated proposals, consolidated those proposals with others, and considered the entire matter anew. Cape Fear Broadcasting, 33 F.C.C.2d 697, 698 (1971). In other instances the Commission has likewise recognized the need to reopen records and reconsider matters. *See e. g.*, In re Cathryn Murphy, 42 F.C.C.2d 346 (1973).

While this decision to reopen proceedings for reconsideration is one committed to the discretion of the agency, Radio Corp. of America v. United States, 341 U.S. 412, 420–421, 71 S.Ct. 806, 95 L.Ed. 1062 (1951); WEBR v. FCC, 136 U.S.App.D.C. 316, 420 F.2d 158, 165–166 (1969), that discretion must be exercised without caprice. In this case, we are persuaded that the Commission failed to do so in refusing to consider the merits of the second proposed sale and assignment offered by appellant LaRose within weeks of the Commission's refusal to renew the WLUX license. *Cf.* Enterprise Co. v. FCC, 97 U.S.App.D.C. 374, 231 F.2d 708 (1955).

To the extent that the Commission's refusal to reopen may reflect a feeling that appellant LaRose should have abandoned the first proposed sale and assignment at an earlier date in the administrative proceedings, it fails to recognize the constraints imposed by appellant's status as a receiver in bankruptcy, as well as the unclear state of the FCC *Second Thursday* doctrine itself. As a receiver, appellant LaRose was an officer of the court, Powell v. Maryland Trust Co., 125 F.2d 260, 271 (4th Cir.), cert. denied, 316 U.S. 671, 62 S.Ct. 1041, 86 L.Ed. 1746 (1942), and charged with the duty of disposing of the assets in a manner that maximized the interests of the creditors. Moreover, the *Second Thursday* doctrine hardly held up a beacon of clarity that definitively foretold the Commission's disposition of the first proposed assignment. Application of *Second Thursday* requires an *ad hoc* balancing of the possible injury to regulatory authority that might flow from wrongdoers' realization of benefit against the public interest in innocent creditors' recovery from the sale and assignment of the license to a qualified party. The first proposed sale and assignment was very beneficial to Capital's creditors and appeared to benefit the principal wrongdoers of Capital only indirectly. Moreover, appellant LaRose felt that this indirect benefit—in this case, the elimination of some of the wrongdoers' secondary liability on certain financial obligations—was mitigated by the fact that those persons were judgment-proof.

In this posture, appellant LaRose was well within the bounds of rationality in terms of faithfulness to his duties as a receiver. And, having arranged for the sale and obtained the referee's approval, LaRose was required to make all reasonable efforts to obtain Commission approval. Without expressing any judgment on the Commission's application of the *Second Thursday* doctrine to the first sale transaction, *see* note 3, *supra*, we do not think LaRose could be faulted for his repeated attempts to persuade the FCC that the balance of public interests lay on his side of the scales.

The Commission's refusal to consider the second proposal frustrates the public interests recognized in *Second Thursday* itself. Since the license is by far the most valuable asset of Capital City, the Commission's refusal effectively deprives creditors of any significant recovery of the moneys they have advanced.[5]

Finally, the Commission's prior approval of the involuntary transfer of the Capital license to appellant LaRose resulted in the continued operation of the station and the incurring of new liabilities from advancements of credit which made that operation possible. This obvious consequence of the assignment and the Commission's permitting the continued operation of the station[6] is at least a factor the Commission should have recognized in determining whether to reconsider the matter.

In most cases, the interests of administrative finality will suffice to support a Commission's discretionary decision to refuse to reconsider an earlier decision. On the facts of this case they will not; and it was an abuse of discretion to refuse to reconsider renewal of the WLUX license and appellant LaRose's tendered proposal for its sale and assignment to appellant Swaggart.

We express no views on whether the proposed sale to appellant Swaggart will satisfy the Commission's *Second Thursday* doctrine. That issue has not yet been considered by the Commission and is not before us. We simply conclude that, on the facts of this record, it was an abuse of discretion for the Commission to take the actions that prevented it from addressing that issue.

Accordingly, we reverse the Commission's order of November 8, 1972 denying reconsideration of its order of September 20, 1972 denying renewal of the WLUX license, and we remand the case to the Commission with directions to consider whether the proposed sale and assignment of such license to appellant Swaggart would promote the "public interest, convenience, and necessity," 47 U.S.C. § 310(b).

It is so ordered.

5. We note in passing that one of those innocent creditors is the federal government itself. Capital City has an outstanding income tax obligation for $24,558, and it appears that the proceeds from the second proposed sale would support a recovery of 51% of this amount. Likewise, sale of the license to appellant Swaggart would support recovery of a similar percentage of some $4,500 in state and local taxes. *See* Exhibit B, Appendix, at 67.

6. The Commission has the power to suspend licenses in an appropriate case. 47 U.S.C. § 303.

UNITED STATES of America

v.

Sterling R. PATRICK, Appellant.

No. 72-1481.

United States Court of Appeals, District of Columbia Circuit.

Argued April 18, 1973.

Decided March 28, 1974.

Defendant was convicted in the United States District Court for the District of Columbia, Gerhard A. Gesell, J., of second-degree murder accompanied by a jury recommendation that he receive psychiatric treatment, and defendant appealed. The Court of Appeals held that instructing jury that it could recommend psychiatric treatment if it returned a guilty verdict was improper, in a case where sole issue was question of criminal responsibility.

Reversed and remanded with directions.

1. Criminal Law ⇐749

Jury's only function is to assess guilt or innocence on basis of their inde-